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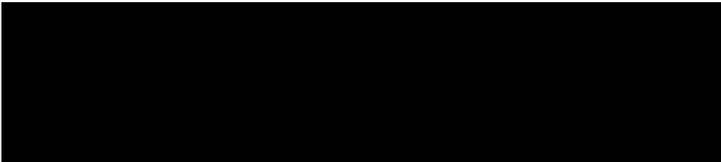


File: EAC 07 246 51940 Office: VERMONT SERVICE CENTER Date: JUN 02 2008

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Delaware limited liability company, is described as an "auto dismantling, exporting, and resale" business. It claims to be an affiliate of Rainbow Auto Dismantling, LLC located in Yerevan, Armenia. The petitioner seeks to employ the beneficiary as its operations manager for a three-year period.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner disputes the director's decision and asserts that the petitioner established that the beneficiary will manage an essential function of the U.S. company. Counsel emphasizes that the petitioner submitted a business plan which demonstrates that additional employees will be hired within one year, thus elevating the beneficiary in a purely managerial role. Counsel submits a brief, but no additional evidence, in support of the appeal.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior

education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The sole issue addressed by the director is whether the petitioner established that the beneficiary would be employed by the United States entity in a managerial capacity. The petitioner does not claim that the beneficiary would be employed in an executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

The nonimmigrant petition was filed on August 28, 2007. The petitioner indicated on Form I-129 that the beneficiary would serve as the operations manager for the U.S. company and stated that it has one employee. In a letter dated August 17, 2007, the petitioner described the beneficiary's proposed duties as follows:

As Operations Manager of [the petitioner], [the beneficiary] will have ultimate authority over day-to-day operational functions of the company and all subordinate personnel involved in the performance of these functions. The Operations manager will have high-level executive decision-making authority, and the operational functions of the company will be under his direct management.

The Operations Manager will oversee all day-to-day operations functions including automotive transport, overhaul, paperwork/administrative, logistics, customs clearances, and fleet management & maintenance as well as management of personnel involved in these tasks. He will handle the financial administration of these functions and will have almost

complete authority over allocation of his allotted budget in order to accomplish the tasks necessary to functions which are his responsibility.

The Operations Manager will have primary responsibility for negotiation of vendor contracts where external services are required by the company to complete operation of these functions. The individual occupying the Operations Manager position will have the final say in all corporate decisions relating to the day-to-day operations, subject only to minimal and periodic oversight by the President of the company.

It is expected that within a year of entry, the Operations Manager will by [sic] managing not only the operations function but also subordinate personnel such as a Dismantling Specialist (a planned hire within a year under our current business plan) and a professional-level employee, a Records Administrator (another planned hire part of whose time will be devoted to supporting Operations and [the beneficiary's] Operations Management functions). As business grows, it is highly likely that another semi-professional employee, a Car Parts Specialist, will be hired to handle inventory control under the Operations Manager's supervision. With regard to these position and all future subordinate operations personnel, the Operations Manager will directly handle recruitment, interviewing, hiring, compensation, evaluation/feedback, training, leave approval, discipline and firing.

The Operations Manager will report directly to the undersigned as President of the company, with no intermediate management or line of accountability in between. The Operations Manager has the ultimate authority over all operational personnel, subject only to the general direction from [the] President.

The petitioner also submitted a business plan for the U.S. company which included a personnel plan for the years 2007 through 2009. The petitioner indicated that its staff for 2007 would include the owner/general manager, a manager, a sales manager, a secretary/records administrator, a dismantling specialist and one "other" employee. An organizational chart for the petitioner depicted a total of three employees, including the president, a sales manager and the beneficiary's proposed position.

The director issued a request for additional evidence on September 11, 2007, advising the petitioner that it had not shown that the beneficiary would be employed a senior level within the organizational hierarchy other than in position title. The director also found insufficient evidence that the beneficiary would supervise and control the work of subordinate supervisory, professional or managerial employees who would relieve him from performing the services of the corporation. The director requested additional evidence to establish that the beneficiary would supervise bona fide managers or professionals in his role as operations manager.

In a response dated September 20, 2007, the petitioner explained that the beneficiary will be employed in a managerial capacity, noting that he would manage the "Operations function, which includes automotive transport, overhaul, paperwork/administrative, logistics, customs clearances and fleet management & maintenance." The petitioner stated that the beneficiary would also manage personnel involved in these tasks when such personnel are hired.

The petitioner further explained that the operations function is an essential function because the business derives its income entirely from the reconditioning, resale and dismantling of automobiles. The petitioner emphasized that since the beneficiary will manage an essential function and discrete department of the business, the petitioner need not establish that he will supervise and control the work of supervisory, professional or managerial subordinates. The petitioner's president further described the beneficiary's responsibilities as follows:

The Operations Manager functions at a senior level within the organizational hierarchy or with respect to the function managed. The individual occupying the Operations manager position has the final say in all decisions relating to the day-to-day operations of the company. The Operations Manager has primary responsibility for negotiation of vendor contracts (such as, for example, towing services) where external services are required by the company to complete operation of these functions. While I, as President, have the right to overrule the decisions of the Operations Manager, I have designed the position to be primarily independent and expect to provide only minimal supervision. However large our company grows – and we do plan to grow substantially – The Operations manager will continue to report only to myself as President and be the sole individual with day-to-day management responsibility for the Operations division and operations functions of the company. . . .

* * *

The Operations Manager exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. As discussed above, the Operations Manager has almost absolute discretion and authority over the Operations function, and operates with only the slightest supervision from the undersigned as President of the company. While we acknowledge that, if the proposed L-1A position is to be a first-line supervisor of subordinate employees, 8 C.F.R. 214.2(l)(1)(ii)(B)(4) requires that the employees supervised are professional, there is no requirement that the proposed L-1A position be a first-line supervisor of subordinate employees at all! Here the proposed L-1A employment will be in the future include first-line supervision, but does not at this point – even will at all times include the exercise of discretion over the day-to-day operations of the activity or function for which the employee has authority.

The petitioner further emphasized that it currently has two employees, a president and a sales manager, and not one employee, as stated in the request for evidence. The petitioner noted that the company plans to hire two additional employees in 2008, one of which would report directly to the beneficiary.

The director denied the petition on October 8, 2007, concluding that the petitioner had failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. In denying the petition, the director found that the petitioner had failed to establish that the beneficiary would be employed in a managerial capacity, other than in position title, as the petitioner had not established that he would manage an essential function or that he would manage a subordinate staff of supervisory, managerial or professional

employees. The director further found that the petitioner's "one-person automobile shop" would not require a bona fide manager to perform the listed duties on a full-time basis and instead concluded that the beneficiary would be engaged in the non-managerial, day-to-day operations of the petitioner's business. Finally, the director observed that the beneficiary's proffered salary is "incongruous with that of an employee who is actually managing other bona fide managers or professionals."

On appeal, counsel for the petitioner asserts that the director erred in denying the petition and provided "very little substance in terms of a basis for this denial." Counsel re-iterates the petitioner's claim that the beneficiary will manage an essential function of the organization and that he will function at a senior level within the petitioner's organizational hierarchy. Counsel asserts that the director ignored the submitted organizational chart and position description and did not adequately explain why the submitted evidence failed to establish the beneficiary's eligibility as a function manager.

In addition, counsel contends that the petitioner has ignored the petitioner's business plan and its intent to hire at least one full-time subordinate for the beneficiary within one year. Counsel further argues that the beneficiary's salary cannot serve as the basis for the denial of the petition. Finally, counsel objects to the director's finding that the petitioner's "one-person automobile shop" would not support a bona fide managerial position, claiming that "this statement indicates a fundamental misunderstanding of the nature of the business and contains an outright misstatement of fact." Counsel emphasizes that the business has two employees and is not merely a "car repair garage," but rather is "engaged in the global purchase, export and resale of whole automobiles and automobile parts."

Counsel concludes with the following statement:

[T]he Operations manager would be engaged in the management of a function of the business – the operations function – which involves responsibility for ensuring that all work involved with this function is handled. While initially the Operations Manager may have direct involvement in day-to-day activities for this still relatively-new business (founded in early 2006), the Business Plan presented clearly contemplates the hiring of additional personnel to take on the day[-]to[-]day tasks within a year thus leaving the Operations Manager in a purely oversight (i.e.: managerial) role. [The petitioner] therefore does in fact require the services of an Operations Manager.

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary would be employed in a primarily managerial capacity. However, upon review of the director's decision, the AAO agrees that the reasons given for the denial are conclusory with few specific reference to the evidence entered into the record. The AAO also concurs with counsel that the director's determination that the beneficiary's salary is "incongruous" with a managerial position is not supported by the statute and regulations, which contain no salary requirements for L-1 beneficiaries. Accordingly, the director's comment in this regard is withdrawn.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial

decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). Therefore, the AAO will address the petitioner's evidence and eligibility herein.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). While the petitioner claims that the beneficiary will manage the petitioner's operations function, the petitioner has failed to establish that the beneficiary's actual duties would be primarily managerial in nature.

In this matter, the petitioner's description of the beneficiary's duties was too general to convey any understanding of what managerial duties he would perform on a day-to-day basis. For example, the petitioner indicated that the beneficiary will "have ultimately authority over day-to-day operational functions," "oversee all day-to-day operations functions," and "have high-level executive decision-making authority" with minimal supervision from the petitioner's president. These statements merely paraphrase portions of the statutory definitions of managerial and executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The petitioner clarified that the "day-to-day operations functions" of the company include "automotive transport, overhaul, paperwork/administrative, logistics, customs clearances, and fleet management & maintenance" activities. However, the petitioner failed to establish that it currently has any employees who would relieve the beneficiary from performing non-managerial duties associated with these functions, and otherwise failed to explain how he would accomplish the management of the function on a day-to-day basis. If the beneficiary himself is responsible for administrative tasks and personally making arrangements for the transport, overhaul, and maintenance activities of the company, it is reasonable to conclude that he will be primarily performing the duties necessary to provide a service, rather than managing these functions. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.* 19 I&N Dec. 593, 604 (Comm. 1988).

The remainder of the beneficiary's position description includes supervisory duties which are clearly prospective in nature. As of the date of filing, the beneficiary would have no subordinate staff in his role as operations manager. On appeal, counsel states that the beneficiary "may have direct involvement in day-to-day activities for this still relatively-new business," and confirms that the position will be a "purely oversight (i.e.: managerial) role" within one year. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Accordingly, the petitioner's future hiring plans need not be taken into account. The record demonstrates that, as of the date of filing, the beneficiary would be responsible for performing essentially all duties associated with the petitioner's operations function, which would necessarily include a number of non-qualifying duties. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of establishing that his duties are "primarily" managerial.

In the present matter, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. This failure of documentation is important because as noted above, several of the beneficiary's daily tasks would not fall directly under traditional managerial duties as defined in the statute. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial or executive, nor can it deduce whether the beneficiary is primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

The AAO will next turn to counsel's primary argument that the beneficiary qualifies for L-1A classification as a "function manager." The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must provide a detailed job description that identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table),

1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)).

Beyond the required description of the job duties, CIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. In the case of a function manager, where no subordinates are directly supervised, these other factors may include the beneficiary's position within the organizational hierarchy, the depth of the petitioner's organizational structure, the scope of the beneficiary's authority and its impact on the petitioner's operations, the indirect supervision of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages.

As discussed above, the petitioner has provided a vague job description that fails to convey any understanding of the actual duties the beneficiary will perform on a daily basis or the amount of time he will devote to managerial duties related to managing the assigned function. Nor has the petitioner established that the beneficiary would function at a senior level within the petitioner's organizational hierarchy. The petitioner operates a service-oriented business with a president and a sales manager, and no subordinate administrative or operational staff. The fact that the beneficiary will report to the president and be solely responsible for the "operations function" is insufficient to establish that he will truly act as a function manager.

In the case of a function manager, the AAO recognizes that other employees carry out the functions of the organization, even though those employees may not be directly under the function manager's supervision. It is the petitioner's obligation to establish that the day-to-day non-managerial tasks of the function managed are performed by someone other than the beneficiary. The addition of the concept of a "function manager" by the Immigration Act of 1990 simply eliminates the requirement that a beneficiary must directly supervise subordinate employees to establish managerial capacity. Despite the changes made by the Immigration Act of 1990, the statute continues to require that an individual "primarily" perform managerial or executive duties in order to qualify as a managerial or executive employee under the Act. The word "primarily" is defined as "at first," "principally," or "chiefly." *Webster's II New College Dictionary* 877 (2001). Where an individual is "principally" or "chiefly" performing the tasks necessary to produce a product or to provide a service or other non-managerial, non-executive duties, that individual cannot also "principally" or "chiefly" perform managerial or executive duties.

Moreover, federal courts continue to give deference to CIS's interpretation of the Immigration Act of 1990 and the concept of "function manager," especially when considering individuals who primarily conduct the business of an organization or when the petitioner fails to establish what proportion of an employee's duties might be managerial as opposed to operational. See *Boyang Ltd. v. INS*, 67 F.3d 305(Table), 1995 WL 576839 at *5 (9th Cir. 1995)(unpublished)(citing to *Matter of Church Scientology Int'l* and finding an employee who primarily performs operational tasks is not a managerial or executive employee); see also, *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999); *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C.Cir. 1991).

It should be emphasized that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The petitioner states that it is engaged in the purchasing, refurbishment, dismantling, export and domestic sale of used automobiles and spare parts. The company currently employs an owner/general manager and a sales manager, and it seeks to hire the beneficiary as its operations manager. All of the petitioner's employees have managerial job titles, and the petitioner has not identified any employees to perform the non-managerial duties associated with the day-to-day operations of the business, as well as non-qualifying tasks related to its financial and administrative functions. At the same time, the petitioner indicates that most of these core functions, other than sales, will come under the beneficiary's responsibility. Therefore, it is reasonable to conclude, and has not been shown otherwise, that the beneficiary will be performing operational duties associated with the above-referenced business activities rather than performing primarily managerial duties.

The record does not establish that a majority of the beneficiary's duties will be primarily managing an essential function of the petitioning organization. The record indicates that a preponderance of the beneficiary's duties will, at least initially, be operational duties necessary to operate the petitioner's business on a day-to-day basis. Although the petitioner claims that the beneficiary's department will be staffed in the future, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. As noted above, a visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248; *Matter of Katigbak*, 14 I&N Dec. at 49. Based on the evidence furnished, it cannot be found that the beneficiary will be employed in a primarily managerial or executive capacity. For this reason, the appeal will be dismissed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal is dismissed.

ORDER: The appeal is dismissed.